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# Free Press-Fair Trial: Restrictive Orders After *Nebraska Press*

By DOUG RENDLEMAN\*

## INTRODUCTION

Mary Quill, a reporter for the *Trumpet*, covers a federal suit in which John Grey seeks to enjoin the county prosecutor from commencing a state criminal prosecution which Grey has alleged will be brought in bad faith and to harass. Much of the evidence which will be introduced in the federal proceeding will be inadmissible in any state criminal prosecution. Consequently, to prevent the federal evidence from prejudicing potential state jurors, federal Judge Pinball announces in court: "Subject to the sanctions provided by law for violation, no newspaper, radio or television station, or any other news media may report the testimony taken or any of the evidence admitted or presented during this trial."

These facts are similar to those presented in *United States v. Dickinson*.<sup>1</sup> The reporters in *Dickinson* had their articles published and were found guilty of contempt for breaching the district court's order. The court of appeals subsequently held the order constitutionally infirm. But, because the contempt hinged on whether the reporters intentionally flouted the order and not on whether the order was constitutional, the court of appeals approved a contempt sanction. The district judge, on remand to reconsider whether to impose contempt in light of the order's invalidity, persisted with the contempt sanction.<sup>2</sup> When the reporters lodged a second appeal, the court of appeals found that the earlier appeal stated the law of the case and affirmed the contempt.<sup>3</sup> The Supreme Court denied the reporters' petition for certiorari.<sup>4</sup>

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<sup>1</sup> 465 F.2d 496, 499-500 (5th Cir.), *on remand*, 349 F. Supp. 227 (M.D. La. 1972), *aff'd per curiam*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

<sup>2</sup> *United States v. Dickinson*, 349 F. Supp. 227 (M.D. La. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

<sup>3</sup> *United States v. Dickinson*, 476 F.2d 373 (5th Cir. 1972), (*per curiam*), *cert. denied*, 414 U.S. 979 (1973).

<sup>4</sup> For a critical article which focuses on *Dickinson*, see Rendleman, *Free*

Much has happened in regard to restrictive orders since *Dickinson*. The major occurrence has been the Supreme Court's opinion in *Nebraska Press Association v. Stuart*,<sup>5</sup> which restricted judicial restraints on the dissemination of material about public trials. The American Bar Association House of Delegates adopted a set of procedures for restrictive orders in 1976<sup>6</sup> and, in 1978, after considering *Nebraska Press* fully, rendered some of the procedures obsolete with a revised set of standards.<sup>7</sup> Other activity in the field has been created by lower courts which continue to grant restrictive orders and scholars who persist in commenting.<sup>8</sup>

The problems in the free press-fair trial area are intractable. In an attempt to understand these problems differently, if not better, this article explores some of the recent developments in restrictive orders.<sup>9</sup> Specifically, the comments will focus on criminal courts' power to impose restrictive orders, the procedure that courts utilize, procedural channels to, and availability of, review of the merits, the collateral bar rule, and problems in substantive law. Some generalizations concerning the judicial process will also emerge.

Two points must be made before beginning. The first is a brief description of a restrictive order. Restrictive orders in a criminal context result from the trial judge's conscientious concern to preserve for defendants an untainted trial. Restrictive orders limit publicity by restricting the dissemination of information. To be distinguished are trial orders such as sequestration, continuance, and voir dire, which manipulate nonpublicity aspects of the judicial process. Unlike the orders in the

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*Press—Fair Trial: Review of Silence Orders*, 52 N.C.L. REV. 127 (1973).

<sup>5</sup> 427 U.S. 539 (1976).

<sup>6</sup> ABA, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (1976) [hereinafter cited as ABA RECOMMENDATIONS].

<sup>7</sup> ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (2d ed., Tent. Draft, 1978) [hereinafter cited as ABA STANDARDS].

<sup>8</sup> See, e.g., *Symposium—Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 383 (1977).

<sup>9</sup> I use "restrictive order" for two reasons. First, it is general enough to include orders sealing transcripts and closing proceedings, in contrast to a silence order which connotes more narrowly an order forbidding someone from disseminating something he already knows. Second, it is not a rhetorical effort to invoke sympathy; and it neither, like "protective order," cloaks the order in rectitude, nor, like "gag order," identifies the order as undesirable.

Mary Quill hypothetical and in *Dickinson*, most restrictive orders are entered in criminal prosecutions.

The orders take many forms. Silence orders forbidding the media from disseminating trial information have been issued.<sup>10</sup> In addition, trial judges have interdicted the media from disseminating evidence given at hearings on pretrial motions.<sup>11</sup> Trial participants and others have been forbidden from discussing lawsuits with the media or the public.<sup>12</sup> Judges have sealed records.<sup>13</sup> The media have been prohibited from publishing evidence received but not presented to the jury; judges have restricted publication to only that which occurred in the courtroom.<sup>14</sup> Judges have entered orders proscribing the media from making or publishing courtroom sketches,<sup>15</sup> or from mentioning a jury's verdict,<sup>16</sup> other indictments,<sup>17</sup> a settlement

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<sup>10</sup> *Cooper v. Rockford Newspapers, Inc.*, 339 N.E.2d 477, 479 (Ill. App. Ct. 1975).

<sup>11</sup> *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1304 (1974) (Powell, Circuit Justice); *Gannett Pacific Corp. v. Richardson*, 580 P.2d 49, 52 (Hawaii 1978); *State v. Simants*, 236 N.W.2d 794, 797 (Neb. 1975) (per curiam), *rev'd sub nom.* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Gannett Co. v. De Pasquale*, 372 N.E.2d 544, 546 (N.Y. 1977), *affirmed*, \_\_\_\_ S. Ct. \_\_\_\_ (1979); *Buffalo Courier-Express, Inc. v. Stiller*, 404 N.Y.S.2d 470, 470-71 (App. Div. 1978); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 129 (Ohio 1976).

<sup>12</sup> *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241, 241 (1978) (per curiam); *Central S.C. Ch., Soc'y of Prof. Journ. v. United States Dist. Ct.*, 551 F.2d 559, 561 n.1 (4th Cir. 1977); *CBS, Inc. v. Young*, 522 F.2d 234, 236 (6th Cir. 1975) (per curiam) (includes relatives, close friends and associates); *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 907 (Fla. 1976); *State v. Bannister*, 3 Med. L. Rptr. 1997, 1998 (Fla. Dist. Ct. App. 1978).

<sup>13</sup> *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241, 241 (1978) (per curiam); *WXYZ v. Hand*, 3 Med. L. Rptr. 1430, 1431 (E.D. Mich. 1977); *Rosato v. Superior Court*, 124 Cal. Rptr. 427, 433 (Ct. App. 1975) (grand jury transcript), *cert. denied*, 427 U.S. 912 (1976); *Miami Herald Pub'g Co. v. State*, 363 So. 2d 603, 605 (Fla. Dist. Ct. App. 1978) (sentencing hearing transcript); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 256 (Minn. 1977) (court retained complaint); *Charlottesville Newspapers, Inc. v. Berry*, 206 S.E.2d 267, 267-68 (Va. 1974) (all new cases filed).

<sup>14</sup> *Younger v. Smith*, 106 Cal. Rptr. 225, 231-32 (Ct. App. 1973); *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 907 (Fla. 1976); *State ex rel. Miami Herald Pub'g Co. v. Rose*, 271 So. 2d 483, 483-84 (Fla. Dist. Ct. App. 1972) (per curiam); *State v. Allen*, 373 A.2d 377, 378 (N.J. 1977); *New York Times Co. v. Starkey*, 380 N.Y.S.2d 239, 241 (App. Div. 1976); *State ex rel. Superior Court v. Sperry*, 483 P.2d 608, 609 (Wash.) *cert. denied*, 404 U.S. 939 (1973).

<sup>15</sup> *United States v. CBS, Inc.*, 497 F.2d 102, 103-04 (5th Cir. 1974).

<sup>16</sup> *Wood v. Goodson*, 485 S.W.2d 213, 214 (Ark. 1972).

<sup>17</sup> *United States v. Schiavo*, 504 F.2d 1, 3 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974).

<sup>18</sup> *Miami Herald Pub'g Co. v. Collazo*, 329 So. 2d 333, 335 (Fla. Dist. Ct. App. 1976).

agreement,<sup>18</sup> the name of a charged juvenile,<sup>19</sup> witnesses' names and photographs,<sup>20</sup> or jurors' names.<sup>21</sup> Finally, portions of the proceedings separate from the formal trial have been closed.<sup>22</sup>

The second observation concerns the impact of *Nebraska Press* on this area. *Nebraska Press* effectively forbids almost all judicial restrictions on disseminating material from public trials.<sup>23</sup> That decision produced responses which are more pluralistic and substantively more difficult than the simple approach of protecting a fair trial with silence orders. Both major opinions in *Nebraska Press* contain dicta approving orders forbidding trial participants from discussing the prosecution with outsiders.<sup>24</sup> Short of violating the sixth amendment right to a public trial, legislatures and appellate courts may permit or compel trial judges to close the courtroom for pretrial hearings and sensitive procedures such as juvenile hearings. Several difficult cases have arisen. In one, a state court decided to allow trial judges to close courtrooms when media coverage of suppression hearings would threaten future jurors' impartiality.<sup>25</sup> The constitutionality of a state statute closing most juvenile records and hearings went unchallenged in one appeal.<sup>26</sup> The effect of the first amendment on a criminal statute forbidding newspapers from publishing the names of those involved in juvenile proceedings is currently before the Supreme Court.<sup>27</sup>

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<sup>18</sup> Oklahoma Pub'g Co. v. District Court, 555 P.2d 1286, 1288 (Okla. 1976), *rev'd per curiam*, 430 U.S. 308 (1977).

<sup>19</sup> Sun Co. v. Superior Court, 105 Cal. Rptr. 873, 877 (Ct. App. 1973).

<sup>20</sup> Central S.C. Ch., Soc'y of Prof. Journ. v. United States Dist. Ct. 551 F.2d 559, 561 n.1 (4th Cir. 1977); Schuster v. Bowen, 496 F.2d 881, 881-82 (9th Cir. 1974); Des Moines Register Co. v. Osmundson, 248 N.W.2d 493, 496 (Iowa 1976).

<sup>21</sup> Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241, 241 (1978) (*per curiam*); Commercial Printing Co. v. Lee, 553 S.W.2d 270, 271 (Ark. 1977) (*voir dire* conducted in chambers); Keene Pub'g Corp. v. Keene District Court, 380 A.2d 261, 262 (N.H. 1977) (probable cause hearing); State *ex rel.* Dayton Newspapers, Inc., 351 N.E.2d 127, 129 (Ohio 1976); Williams v. Stafford, 589 P.2d 322, 322 (Wyo. 1979) (bail hearing).

<sup>22</sup> See, e.g., Oklahoma Pub'g Co. v. District Court, 430 U.S. 308, 310-11 (1977) (*per curiam*).

<sup>23</sup> 427 U.S. at 553-55 (Burger, C.J.) (majority opinion); *id.* at 602 (Brennan, J., concurring in the judgment). See also Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

<sup>24</sup> Gannet Co. v. De Pasquale, 372 N.E.2d 544 (N.Y. 1977), *affirmed*, \_\_\_ S. Ct. \_\_\_ 1979.

<sup>25</sup> Oklahoma Pub'g Co. v. District Court, 430 U.S. 310, 310 (1977) (*per curiam*).

<sup>27</sup> State *ex rel.* Smith v. Daily Mail Pub'g Co., 248 S.E.2d 269 (W. Va.), *affirmed*, \_\_\_ S. Ct. \_\_\_ 1979.

The rules which govern access to juvenile proceedings, suppression hearings, preliminary hearings and arraignments, and bail hearings remain unclear.<sup>28</sup> So long as this continues, trial courts will issue restrictive orders.

## I. JURISDICTION: THE ABILITY TO ISSUE RESTRICTIVE ORDERS

Both subject matter jurisdiction (the power to resolve a particular type of dispute) and personal jurisdiction (the power to affect a particular person) are involved in unconventional ways in restrictive orders.

The subject matter jurisdiction question is whether a trial judge presiding over a criminal prosecution possesses authority to issue restrictive orders aimed at circumscribing publicity. Courts find subject matter jurisdiction easier to assume than to examine.<sup>29</sup> Courts with general constitutional and statutory jurisdiction to adjudicate criminal cases and to grant injunctions possess subject matter jurisdiction to enjoin a criminal action.<sup>30</sup> Courts with limited criminal and no equitable jurisdiction, however, lack subject matter jurisdiction to grant restrictive orders so long as restrictive orders are characterized as injunctions.<sup>31</sup> As a matter of policy, if the court possesses power to protect a criminal accused's right to an orderly and nonprejudicial trial, it should be able to regulate, in the furtherance of this goal, certain conduct outside the courtroom.<sup>32</sup>

Accepting that the courts have the power to issue restrictive orders, the question becomes one of whom the court can make subject to the order. A recent student note incorrectly argues that restrictive orders against the media exceed the inherent power of the judiciary because the orders regulate the

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<sup>28</sup> Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 470-72 (1977). See also Williams v. Stafford, 589 P.2d 322, 330 (Wyo. 1979) (Raper, C.J., dissenting).

<sup>29</sup> Sheppard v. Maxwell, 384 U.S. 333, 361-63 (1966); United States v. Schiavo, 504 F.2d 1, 6 (3d Cir.), cert. denied, 419 U.S. 1096 (1974); United States v. Dickinson, 465 F.2d 496, 511 (5th Cir.), on remand, 349 F. Supp. 227 (M.D. La. 1972), aff'd, 476 F.2d 373 (5th Cir.), cert. denied, 414 U.S. 979 (1973); Rosato v. Superior Court, 124 Cal. Rptr. 427, 437-38 (Ct. App. 1975), cert. denied, 427 U.S. 912 (1976).

<sup>30</sup> Cf. Z. CHAFEE, SOME PROBLEMS OF EQUITY 364-74 (1950) (subject matter jurisdiction under the Norris-LaGuardia Act).

<sup>31</sup> Id. at 312-13.

<sup>32</sup> See Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 903-905 (1975).

conduct of nonparties.<sup>33</sup> Assuming that the media is a nonparty begs the personal jurisdiction question. Due process requirements of personal jurisdiction grow out of two policies: the sovereign must limit the exercise of its judicial authority to persons properly before it; and the initiating litigant must notify affected people so that they can participate in the process. Service of process upon a defendant in the court's bailiwick satisfies both requirements. Referring to the hypothetical which began this article, Mary Quill was not a party to the criminal prosecution, and thus arguably not properly before the court, and Judge Pinball did not serve formal notice on her or allow her an opportunity to participate in shaping the order.

Restrictive orders, with injunction-like features, arguably manage to avoid the above requirements. Equity often accommodates traditional analysis of personal jurisdiction to *ex parte* and attenuated procedure by ignoring it; the court simply asks as part of the contempt inquiry whether a person must comply with an injunction.<sup>34</sup> In *Dickinson*, the court had "no problem" with this type of personal jurisdiction: "the District Court certainly has power to . . . enforce those orders against all who have actual and admitted knowledge of its prohibitions."<sup>35</sup> Thus, the judge elevates the media to party status and subjects reporters to the risk of contempt simply by saying so.

Generally, such broad theories of contempt have been rejected.<sup>36</sup> One basis for rejection is that courts, in attempting to compel the world at large to obey their decrees, are exercising "sovereign powers to declare conduct illegal"—powers reserved to the legislature.<sup>37</sup> Restrictive orders which judges announce

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<sup>33</sup> Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L.J. 342 (1977).

<sup>34</sup> See generally, Rendleman, *supra* note 32.

<sup>35</sup> 465 F.2d at 511, 512.

<sup>36</sup> The Supreme Court has said that an injunction running against all persons with notice is "clearly erroneous" because it "assumes to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 436-37 (1934) (footnote omitted). Furthermore, Federal Rule of Civil Procedure 65(d) rejects an expansive theory of obligation, stating that only "the parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice" are obligated to obey. FED. R. CIV. P. 65(d).

<sup>37</sup> *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930).

rather than formulate after adversary process and which compel amorphous groups to comply assume the appearance of legislation.

A second notion which leads to rejection of the *Dickinson*-type contempt is that, generally, only parties and those adequately represented by parties receive adequate notice to comply with in personam orders. In the press of time, formal service is too cumbersome; in the analogous field of temporary restraining orders, telephone notice has been approved.<sup>38</sup> Entities not notified and not in a sufficient relationship with one notified may ignore a restrictive order and defend contempt on the ground that the order is void for lack of personal jurisdiction.<sup>39</sup> Therefore, a restrictive order against "all members of the news media"<sup>40</sup> violates ideas of both separation of powers and due process.<sup>41</sup> The procedure that a court accords a person affects whether the court secures jurisdiction over that person, and this article turns next to the question of trial court procedure.

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<sup>38</sup> Advisory Committee's Note to 1966 Amendments to Rule 65(b), 39 F.R.D. 122, 124-25 (1966).

<sup>39</sup> Rendleman, *supra* note 32. The media is unnamed in a trial participant restrictive order but affected because the order affects its news gathering. *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975). *But see, Rosato v. Superior Court*, 124 Cal. Rptr. 427, 438 (Ct. App. 1975), *cert. denied*, 427 U.S. 912 (1976). The question of whether the media possesses standing to challenge such an order will be considered below.

A participant in litigation may waive the right to challenge the court's jurisdiction over the person. *See, e.g., Wyrough & Loser, Inc. v. Pelmor Labs, Inc.*, 376 F.2d 543, 547 (3d Cir. 1967). The media in *Nebraska Press* responded to nonparty status by "intervening" in the criminal case. The Nebraska Supreme Court held that even though permission to intervene was erroneously granted, the media voluntarily assented to in personam jurisdiction and was obligated to comply with the restrictive order. *State v. Simants*, 236 N.W.2d 794, 802 (Neb. 1975), *rev'd on other grounds sub. nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). *See also, Oklahoma Pub'g Co. v. District Court*, 555 P.2d 1286, 1289 (Okla. 1976), *rev'd per curiam on other grounds*, 430 U.S. 308 (1977). Compare *Miami Herald Pub'g Co. v. State*, 363 So. 2d 603, 604 (Fla. Dist. Ct. App. 1978) and *People v. Green*, 4 Med. L. Rptr. 1561 (N.Y. Sup. Ct. 1978) (media allowed to intervene in a criminal case) with *United States v. Mitchell*, 551 F.2d 1252, 1256 (D.C. Cir. 1976) (judge directed movants to turn request to intervene into a miscellaneous civil action), *rev'd on other grounds sub. nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). *Miami Herald* and *Green* have almost the same practical effect as granting standing to contest a restrictive order.

<sup>40</sup> *See Oklahoma Pub'g Co. v. District Court*, 555 P.2d 1286, 1289 n.1 (Okla. 1976), *rev'd per curiam*, 430 U.S. 308 (1977).

<sup>41</sup> *Alemite Mfg. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930). *See also State v. Simants*, 236 N.W.2d 794, 802 (Neb. 1975), *rev'd on other grounds sub. nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The Supreme Court reversed but apparently approved this concept. 427 U.S. at 565-66, 566 n.10.



## II. THE PROCEDURES FOR FORMULATION AND REVIEW OF RESTRICTIVE ORDERS

### A. Trial Court Procedures

Many judges, according to the media the same procedural protections Judge Pinball extended to Mary Quill, have simply announced the order *sua sponte*.<sup>42</sup> In 1975, a federal court of appeals rejected the argument that the court should provide notice and an opportunity to be heard to the media before issuing a restrictive order because "we have been unable to find any authority to support it."<sup>43</sup> This dismal state of affairs did not persist long.

The need for participation by all affected is obvious. Decisionmakers often fail to consider peoples' interests when those people are not heard.<sup>44</sup> Fair adjudication is more likely to occur when the tribunal hears all those affected. Facts are difficult to find and evaluate. Restrictive orders, like injunctions, turn

on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.<sup>45</sup>

Those who argue against formal restrictive order procedure assert that it will complicate and delay criminal trials. Indeed, the search for an adequate procedure was complicated by need for speed, the media's nonparty status, and complexity of the legal and factual inquiry which must consider measures short

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<sup>42</sup> See, e.g., *United States v. Schiavo*, 504 F.2d 1, 3 (3d Cir. 1974); *Central S.C. Ch., Soc'y Prof. Journ. v. Martin*, 431 F. Supp. 1182, 1190-91 (D.S.C. 1977); *New York Times Co. v. Starkey*, 380 N.Y.S.2d 239, 241 (App. Div. 1976).

<sup>43</sup> *CBS, Inc., v. Young*, 522 F.2d 234, 241 n.2 (6th Cir. 1975). See also STAFF OF SENATE SUBCOMM. ON CONST. RIGHTS, COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., BACKGROUND REPORT ON FAIR TRIAL AND FREE EXPRESSION 62 (Comm. Print. 1976) [hereinafter cited as BACKGROUND REPORT].

<sup>44</sup> *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

<sup>45</sup> *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (footnote omitted).

of restrictive orders.<sup>46</sup> However, the alternative to broadening procedure is to ignore the interests of the public and the media. Such an approach is intolerable.

Procedures used in formulating restrictive orders have taken many forms. Some judges initiated informal procedures; one judge called reporters into chambers to discuss alternatives.<sup>47</sup> Others followed more formal procedures, such as those used in equity to grant injunctions.<sup>48</sup>

In *Nebraska Press*, Justice Brennan observed that if the Constitution were construed to allow restrictive orders, courts would have to provide to the press notice and an opportunity to be heard.<sup>49</sup> The American Bar Association (ABA) in 1976 recommended that before entering an order enforceable by contempt, the judge circulate the proposed order and give public notice, receive written comments, conduct a hearing, and draft specific findings and a detailed order.<sup>50</sup> Courts began to hold that notice, an opportunity to be heard, and written findings are constitutional prerequisites for restrictive orders.<sup>51</sup> Judge Pinball's order to Mary Quill fails under these decisions.

*Nebraska Press* also appeared to place the burden of justifying a restrictive order on the proponent and to require the

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<sup>46</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-65 (1976) (measures short of restrictive order discussed).

<sup>47</sup> *State v. Joyce*, 390 A.2d 151, 153 (N.J. Super. Ct. Law Div. 1978).

<sup>48</sup> *Cooper v. Rockford Newspapers, Inc.*, 339 N.E.2d 477, 478-79 (Ill. App. Ct. 1975).

<sup>49</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 608 (Brennan, J., concurring).

<sup>50</sup> ABA RECOMMENDATIONS, *supra* note 6, at 10-11.

<sup>51</sup> *United States v. Schiavo*, 504 F.2d 1, 8 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974); *id.* at 14-15 (Adams, C.J., concurring); *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976); *State v. Bannister*, 3 Med. L. Rptr. 1997, 1998 (Fla. Dist. Ct. App. 1978); *Des Moines Register and Tribune Co. v. Osmundson*, 248 N.W.2d 493, 500 (Iowa 1976); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977); *Gannett Co. v. De Pasquale*, 372 N.E.2d 544, 550 (N.Y. 1977), *affirmed*, — S. Ct. — (1979); *New York Times Co. v. Starkey*, 380 N.Y.S.2d 239, 244 (App. Div. 1976); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 130-31 (Ohio 1976). *See also* STAFF OF SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS, COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., REPORT ON FREE PRESS—FAIR TRIAL 12 (Comm. Print 1976) [hereinafter cited as STAFF REPORT]. *But see* *United States v. Gurney*, 558 F.2d 1202, 1211 (5th Cir. 1977). [Ed. note: The Supreme Court majority opinion in *Gannett*, which spoke for only four Justices on this point and turned on the sixth amendment, held that the amendment guaranteed a public trial to protect the party charged, not to protect the public, and assumed that the adverse parties would protect whatever public interest existed.]

judge to make specific findings.<sup>52</sup> The ABA procedure falls short of this by permitting the judge to draft the order before allowing the media to participate. A judge could thus present the press with a *fait accompli*, hear opposition, and then issue the order originally proposed. The latter approach circumvents all the reasons for requiring formal procedure in the first place. Findings based on the evidence presented allow the adversary system to function, force the decisionmaker to consider carefully, and provide a basis for review of the order. The judge should approach the hearing with as open a mind as the circumstances permit and decide on the basis of evidence presented. In particular, the judge should be free of any vested interest in a specific order.

Because of the pressure for expedition and the irregular party structure, restrictive order procedure is in a class by itself. Courts apply equity concepts such as the collateral bar rule and use injunction language.<sup>53</sup> The ABA recommendations paraphrase injunction procedure.<sup>54</sup> Restrictive order procedure often resembles that followed when a party applies for a preliminary injunction.<sup>55</sup> Part of the reason for this resemblance is that the Supreme Court takes a broad view of orders subject to injunction procedure.<sup>56</sup> For example, as the Supreme Court hinted in *Nebraska Press*, the rules governing who is constrained to obey an injunction<sup>57</sup> may determine who must comply with a restrictive order.<sup>58</sup> Courts considering restrictive orders would do well to follow the general policies behind injunc-

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<sup>52</sup> 427 U.S. at 569. See also *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 912 (Fla. 1976) (Sundberg, J., concurring). *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 257-58 (Minn. 1977); *State ex rel. Beacon Journal Pub'g Co. v. Kainrad*, 348 N.E.2d 695, 697 (Ohio 1976); *Oklahoma Pub'g Co. v. District Court*, 555 P.2d 1286, 1290 (Okla. 1976), *rev'd per curiam on other grounds*, 430 U.S. 308 (1977); *Williams v. Stafford*, 589 P.2d 322, 326 (Wyo. 1979).

<sup>53</sup> See, e.g., *Oklahoma Pub'g Co. v. District Court*, 429 U.S. 967, 967, (1976) (granting stay).

<sup>54</sup> Compare, Recommendation 6, ABA RECOMMENDATIONS, *supra* note 6 at 10, with FED. R. CIV. P. 52 and 65(b). Compare Recommendation 6, ABA RECOMMENDATIONS, *supra* note 6 at 11, with F. R. CIV. P. 65(b).

<sup>55</sup> See 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2949 (1973).

<sup>56</sup> See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 177-80 (1973); *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 75-76 (1967); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-15 (1945).

<sup>57</sup> See Rendleman, *supra* note 32.

<sup>58</sup> 427 U.S. at 565-66.

tion procedure. These flexible procedures have been worked out over generations of experience to govern fluid situations.<sup>59</sup>

An excellent technique for establishing a sound restrictive order procedure is for the state supreme court to use its rule-making powers. The Minnesota Supreme Court recently promulgated a procedure for restricting access to records.<sup>60</sup> Under the Minnesota procedure, someone must move for an order sealing records. Notice is given to "interested persons, including the news media." While the moving party carries the burden of proof, others may present evidence and argument, and a court reporter keeps a record of the hearing. The judge must base findings on the evidence and reject alternatives. The rule specifically provides for a direct review by the Minnesota Supreme Court.<sup>61</sup> Procedure for orders to exclude the public from pretrial hearings is less protective, not specifying notice to the media and allowing the judge to close a hearing upon finding a "substantial likelihood that matter inadmissible at a later trial will, if disseminated, interfere with a potential jury's impartiality."<sup>62</sup> If appellate courts had followed Minnesota's example and used rulemaking powers to add constitutional restrictive order rules to procedural structures, a majority of the appellate opinions discussed and cited in this article would be unwritten, unnecessary, and perforce uncited.

### B. *Attempts to Attack the "Indirect" Restrictive Order*

A problem arises concerning whether the media may assail orders which enjoin trial participants or close part of the proceedings. These orders affect the media's ability to gather news without being directly addressed to the media. Courts have discussed this problem in terms of standing, but standing launches an inquiry both too narrow and too unfocused to encompass an understanding of the interests affected.

Since the order threatens the media's access to sources of

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<sup>59</sup> It would be unwise to adopt completely injunction procedure. In *United States v. Schiavo*, 504 F.2d 1, 8 n.17 (3d Cir.), cert. denied 419 U.S. 1096 (1974), the Court refused to do so.

<sup>60</sup> MINN. R. CRIM. P. 25.03 (eff. Jan. 1, 1979).

<sup>61</sup> *Id.* at 25.03-5.

<sup>62</sup> *Id.* at 25.01. [Ed. note: The muddle created by the divided opinion in *Gannett* further emphasizes the need for comprehensive rules or statutes specifying procedure and defining standards.]

information, the focus should be on the strength of the rights affected,<sup>63</sup> not on standing. Accordingly, one response in denial of media intervention is that since the media is left with the same right of access as everyone else,<sup>64</sup> the order impedes the media no more than any other member of the public.

Such an approach ignores reality. A restrictive order affects the media in a peculiarly draconian sense. Media representatives may become parties and subject to contempt by having it said that they are parties.<sup>65</sup> If they ignore the order and are charged with contempt, the collateral bar rule may insulate the underlying order from scrutiny;<sup>66</sup> this leaves only the questions of whether they knew of the order and whether they violated it. Thus the peculiarities of equitable procedure justify the ostensibly strained decision that even though the court may lack jurisdiction over media representatives, they possess standing to challenge restrictive orders directed toward trial participants.

Courts which find standing hold that the restrictive order curtails the media's ability to gather news.<sup>67</sup> Therefore, if it is necessary to discuss the issue in terms of standing, it should suffice to say that "the constitutional right here sought to be enforced is of such significance that any member of the public has a standing to question his exclusion from a judicial hearing."<sup>68</sup> That a media representative lacks "party" status to the

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<sup>63</sup> Cf. *Rakas v. Illinois*, 99 S. Ct. 421, 428 (1978) (discussion of standing in fourth amendment context).

<sup>64</sup> *Houchins v. KQED, Inc.*, 98 S. Ct. 2588, 2597 (1978) (plurality opinion); *Williams v. Stafford*, 589 P.2d 322, 325 (1979).

<sup>65</sup> See *Rosato v. Superior Court*, 124 Cal. Rptr. 427, 440 (Ct. App. 1975), *cert. denied*, 427 U.S. 912 (1976).

<sup>66</sup> See discussion on the collateral bar rule contained in notes 116-49 *infra* and accompanying text.

<sup>67</sup> *United States v. Gurney*, 558 F.2d 1202, 1206 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *Central S.C. Ch., Soc'y Prof. Journ. v. Martin*, 556 F.2d 706, 707-08 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *CBS, Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975); *Commercial Printing Co. v. Lee*, 553 S.W.2d 270, 271 (Ark. 1977); *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 908 (Fla. 1976); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 256 (Minn. 1977); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 130 (Ohio 1976). See also, *STAFF REPORT*, *supra* note 51, at 11-12.

<sup>68</sup> *Phoenix Newspapers, Inc. v. Jennings*, 490 P.2d 563, 567 (Ariz. 1971). [Ed. note: In *Gannett*, four Justices asserted that the public, including the press, lacks an independently enforceable right to attend a criminal trial. Justice Powell, concurring,

criminal case or to the restrictive order should not change the result.

Trial judges face pressure to avoid excessive publicity. While appellate courts reverse criminal convictions because of excessive publicity, no appellate court has reversed a conviction because of excessive restrictions on the media. Trial dynamics lead judges to avoid potentially unfair publicity. Unless the media receives notice and a full opportunity to participate, trial judges may concentrate on the interest in fair trial and ignore "the largely theoretical and remote" benefits of free expression.<sup>69</sup>

The importance of the issues, the media's more than theoretical risk and, most of all, the assurance of full consideration of the merits before adjudication compel the conclusion that extending full procedural rights to all interested persons before considering any restrictive order is the best course to follow. In some cases, the courts have found for the media and refused to grant restrictive orders requested by parties.<sup>70</sup>

### C. Appellate Review

The media's irregular party status and the need for an expeditious decision present special problems regarding appellate review of restrictive orders. Normally a losing party appeals from the final judgment of a trial court. The appellate process lasts a little less than a year, from a leisurely 134-day briefing schedule in criminal appeals, to oral argument and a reasoned, written opinion.<sup>71</sup> But consider Mary Quill when Judge Pinball tells her not to publish a story. The trial will proceed. To consult a lawyer, she will have to leave the courthouse. An attorney will tell her that it may be difficult to do anything before the deadline for tomorrow's paper.

Mary Quill has three options which she may use singly or combined. First, she may ask Judge Pinball to reconsider the

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and the four dissenting Justices found constitutionally-based rights to be heard and to be present generally.]

<sup>69</sup> BACKGROUND REPORT, *supra* note 43, at 62.

<sup>70</sup> *State v. Joyce*, 390 A.2d 151, 155 (N.J. Super. Ct. Law Div. 1978); *People v. Green*, 4 Med. L. Rptr. 1561, 1564 (N.Y. Super Ct. 1978).

<sup>71</sup> P. CARRINGTON, D. MEADOR, M. ROSENBERG, JUSTICE ON APPEAL 14-15 (1976); Lay, *Reconciling Tradition with Reality: The Expected Appeal*, 23 U.C.L.A. L. REV. 419, 419-20, 422 (1976).

order.<sup>72</sup> The court may deny formal intervention in the belief that an appearance by the media will add nothing to the more important issue of guilt or innocence except delay and complexity.<sup>73</sup> If, however, courts characterize the restrictive order as an injunction compelling the reporter to obey, she may file a motion asking Judge Pinball to clarify, modify, or dissolve the order.<sup>74</sup>

Second, Mary Quill may seek appellate review. In a federal system, she has roughly three appellate routes: an interlocutory appeal based on permission from both the trial judge and the appellate court;<sup>75</sup> an appeal by right if the restrictive order is a final decision<sup>76</sup> or a preliminary injunction;<sup>77</sup> and review by extraordinary or prerogative writ which hinges on the appellate court exercising its discretion.<sup>78</sup> Under any of the appellate routes suggested, an attorney will request a stay from both trial and appellate courts and seek an expedited appeal.<sup>79</sup>

Mary Quill's third option is to publish her story. Outrage at the substantive and procedural aspects of the restrictive order as well as the lack of time to challenge it may prompt her to disseminate despite the order. If Judge Pinball decides to prosecute her for contempt, she will argue that the order violates the first amendment.

Whichever option is chosen, the motivation for each is the same. Restrictive orders begin to injure the marketplace of ideas immediately. The cliché, "justice delayed is justice denied," is particularly appropriate. Today's hot news will be next week's cold history.<sup>80</sup> This damage is particularly distasteful in light of *Nebraska Press*' holding that many restrictive

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<sup>72</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 576-77 (1976) (Brennan, J., concurring).

<sup>73</sup> *State v. Simants*, 236 N.W.2d 794, 798 (Neb. 1975) (per curiam), *rev'd on other grounds sub nom.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

<sup>74</sup> See *Developments in the Law, Injunctions*, 78 HARV. L. REV. 994, 1080-86 (1965).

<sup>75</sup> 28 U.S.C. § 1292 (b) (1976).

<sup>76</sup> 28 U.S.C. § 1291 (1976).

<sup>77</sup> 28 U.S.C. § 1292 (a)(1) (1976).

<sup>78</sup> 28 U.S.C. § 1651 (a) (1976); FED. R. APP. P. 2, 21.

<sup>79</sup> FED. R. CIV. P. 62; FED. R. APP. P. 8(a). See also, 11 C. WRIGHT & A. MILLER, *supra* note 55, at §§ 2904, 2908; 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* § 3954 (1977).

<sup>80</sup> *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976).

orders, including Judge Pinball's, are presumptively incorrect. Testing orders by disobeying them evidences disrespect for the trial judge, while writhing under the regimen of an erroneous order destroys the full exercise of constitutional rights. Therefore, appellate courts should review restrictive orders promptly; and if the orders are incorrect, the court should suspend their operation.<sup>81</sup>

In an earlier article, the present author concluded dolorously that the media lacked a realistic route to effective review of a restrictive order and that the proper appellate route was difficult or impossible to discern.<sup>82</sup> Today courts have substantially clarified the process. As devices to gain review of restrictive orders, the extraordinary writs (mandamus, prohibition and their functional equivalents) have triumphed.<sup>83</sup> Adroit lawyers couple requests for extraordinary writs with applications to both trial and appellate courts to dissolve, modify, and stay.<sup>84</sup> A few federal courts have classified restrictive orders as

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<sup>81</sup> STAFF REPORT, *supra* note 51, at 11.

<sup>82</sup> Rendleman, *supra* note 4, at 128-44 ("There is no realistic route to relief in the appellate hierarchy.").

<sup>83</sup> *United States v. Sherman*, 581 F.2d 1358, 1360-61 (9th Cir. 1978); *Central S.C. Ch., Soc'y Prof. Journ. v. Martin*, 556 F.2d 706, 707 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *CBS, Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975); *Commercial Printing Co. v. Lee*, 553 S.W.2d 270, 272-73 (Ark. 1977); *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 911 (Fla. 1976); *Gannett Pacific Corp. v. Richardson*, 580 P.2d 49, 52-53 (Hawaii 1978) (prohibition); *Des Moines Register and Tribune Co. v. Osmundson*, 248 N.W.2d 493, 496 (Iowa 1976); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 255, 256-57 (Minn. 1977) (writ of prohibition); *State v. Simants*, 236 N.W.2d 794, 798 (Neb. 1975) (per curiam), *rev'd on other grounds sub nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Gannett Co. v. De Pasquale*, 372 N.E.2d 544, 546, (N.Y. 1977), *affirmed*, \_\_\_\_ S. Ct. \_\_\_\_ (1979) (proceeding "in the nature of prohibition"); *New York Times Co. v. Starkey*, 380 N.Y.S.2d 239, 242-43, (App. Div. 1976) (vacatur); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 129 (Ohio 1976); *State ex rel. Beacon Journal Pub'g Co. v. Kainrad*, 348 N.E.2d 695, 699 (Ohio 1976); *Oklahoma Pub'g Co. v. District Court*, 555 P.2d 1286, 1288 (Okla. 1976), *rev'd per curiam on other grounds*, 430 U.S. 308 (1977); *Charlotteville Newspapers, Inc. v. Berry*, 206 S.E.2d 267 (1974). See also, 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 79, at § 3933.

<sup>84</sup> *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241 (1978) (per curiam); *Times-Picayune Pub'g Corp. v. Schulinkamp*, 419 U.S. 1301, 1304 (1974) (Powell, Circuit Justice). Mr. Landau, representing the press, argues that restrictive orders should be automatically stayed. Landau, *Fair Trial and Free Press: A Due Process Proposal—The Challenge of the Communications Media*, 62 A.B.A.J. 55, 59 (1976). In practical terms, this means that no order would operate until an appellate court approved it. This rule would nearly destroy the criminal judge's ability to use restrictive orders.



appealable final decisions under the practical finality-collateral order doctrine.<sup>85</sup> Restrictive orders are final under the collateral order doctrine because they irreparably affect rights every day that pass without judicial protection.<sup>86</sup>

Both methods are acceptable and each has its own advantages. The collateral order doctrine has a benefit for the media: once the appellate court finds the order final, it has no discretion to deny review. Extraordinary writ practice solves the problem presented by the media's lack of party status in the criminal action. An extraordinary writ is styled as a separate action in the appellate court filed by one aggrieved against the trial judge; such a procedure fits the conventional parties matrix.<sup>87</sup> Since most states have extraordinary writs, while the collateral order doctrine is a complex subspecies of federal practice, the procedure followed by a large majority of courts is to use the extraordinary writ to review restrictive orders. This article will hereinafter refer to review as being under an extraordinary writ, although it can be as a collateral order where appropriate.

The extraordinary writs, Chafee said in in 1950, "are rusty with antique learning and nicked with technicalities."<sup>88</sup> Appellate courts possess power to interrupt trial court proceedings by accepting and deciding writs, but because of the policy to review only after a final decision, they exercise their power sparingly and rarely.<sup>89</sup> Appellate courts should use the extraordi-

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<sup>85</sup> *United States v. Gurney*, 558 F.2d 1202, 1206-07 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *United States v. Schiavo*, 504 F.2d 1, 4-5 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974). See also *Kovach v. Maddux*, 238 F. Supp. 835, 836 (M.D. Tenn. 1965); *State v. Allen*, 373 A.2d 377, 379 (N.J. 1977). See also 15 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE*, § 3911 at 489 (1976), and Supp. n.36 (1979); *BACKGROUND REPORT*, *supra* note 43, at 28-30.

<sup>86</sup> *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam). *Skokie* was clearly predictable after *Shuttleworth v. City of Birmingham*, 394 U.S. 147, 159-64 (1969) (Harlan, J., concurring), and *Freedman v. Maryland*, 380 U.S. 51, 57-61 (1965).

<sup>87</sup> See *United States v. Sherman*, 581 F.2d 1358, 1360-61 (9th Cir. 1978); *Gannett Pacific Corp. v. Richardson*, 580 P.2d 49, 57-58 (Hawaii 1978); *State v. Simants*, 236 N.W.2d 794, 798 (Neb. 1975) (per curiam), *rev'd on other grounds sub nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). See also 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 79, at § 3932 (1977) (appellate courts dislike review apparently aimed at the trial judge personally).

<sup>88</sup> Z. CHAFEE, *supra* note 30, at 361.

<sup>89</sup> Suitors must show more than reversible error to summon review; the trial court

nary writs to review restrictive orders simply because the orders satisfy the criteria: they impinge on basic constitutional rights; a prompt, detached judgment is mandated because a personally involved trial judge may have overlooked the media's interest; and trial courts seek guidelines for future restrictive orders.<sup>90</sup>

For the media, simply being permitted to raise the propriety of a restrictive order is insufficient. Erroneous orders, so long as they are in effect, prevent the media from exercising first amendment rights. Time, a perishable commodity, cannot be recovered. The goal of the first amendment—keeping citizens currently informed—is defeated.<sup>91</sup> Expedited review should lead to expedited relief.

A stay can avoid the above problem. Trial and appellate courts use stays and appellate injunctions to suspend an order's operation pending an appellate decision. Generally a stay ensures an effective eventual judgment, preserves a controversy for the court to decide, and allows a plaintiff to profit from an appellate victory. However, in restrictive order cases a stay can result in a corresponding problem. If a stay suspends a trial court order and the enjoined events occur before an appellate decision, the decision to stay may decide the lawsuit without full appellate consideration. In the *Pentagon Papers* case, the Supreme Court "stayed" the newspapers from publishing the documents pending a final decision. This action permitted the Court to decide a live controversy. Continuing to "stay" publication pending a final decision was "final" for each day the interim order was effective. On the other hand, Justice Black wanted to vacate the order without oral argument.<sup>92</sup> Allowing the newspapers to publish would have left nothing for the Court to forbid when it handed down its opinion. The govern-

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must have abused discretion in an "extraordinary" fashion. See e.g., *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53 (1976). Several courts have used such narrow language when asked to grant extraordinary relief against a restrictive order. See *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); *Honolulu Advertiser, Inc. v. Takao*, 580 P.2d 58, 62 (Hawaii 1978); *State ex rel. Beacon Journal Pub'g Co. v. Kainrad*, 348 N.E.2d 695, 699 (Ohio 1976).

<sup>90</sup> Rendleman, *supra* note 4, at 137-38.

<sup>91</sup> *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 910 (1977). See also *Nebraska Press Ass'n v. Stuart*, 432 U.S. 1327, 1329 (1975) (Blackmun, Circuit Judge); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976).

<sup>92</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

ment's request to outlaw publication would have become moot. This raises the question of whether constitutional procedure must include access to prompt appellate consideration.

A governing precedent is the *per curiam* opinion in *National Socialist Party of America v. Village of Skokie*.<sup>93</sup> An Illinois trial court enjoined the N.S.P. from parading or demonstrating; the state appellate courts refused to expedite the N.S.P.'s appeal or to stay the injunction. The Supreme Court held that the Illinois procedure constituted an improper procedural restraint. To sort protectible expression from proscribable nonexpressive conduct, the state must "provide strict procedural safeguards" including either "immediate appellate review" or a stay.<sup>94</sup> Subsumed but unstated in the opinion is the conclusion that the injunction was too broad to be constitutional. *Skokie* makes it clear that restrictive order procedure must include prompt review and a procedure either to reverse or to stay erroneous orders.

Press representatives argue that trial courts' restrictive orders should be automatically stayed pending an appellate decision.<sup>95</sup> In almost every instance, an automatic stay would let the media disseminate the material the trial judge sought to restrict and thereby present the appellate court with a moot appeal. This procedural rule is at odds with a substantive standard which approves some restrictive orders.<sup>96</sup> The ABA committee correctly rejected the automatic stay and recommended "expedited judicial review of any restrictive orders before the issues addressed become moot."<sup>97</sup> To determine whether the committee states an aspiration rather than a practical policy, we must look at the actual results in decided appeals.

The means for speedy review of restrictive orders are stays and extraordinary writs. The published appellate reports illustrate disparate approaches to these means. Many appellate courts have reviewed restrictive orders and rendered effective decisions within one or a few days after the trial judges had

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<sup>93</sup> 432 U.S. 43 (1977) (*per curiam*).

<sup>94</sup> *Id.* at 44.

<sup>95</sup> Landau, *supra* note 84, at 59-60.

<sup>96</sup> Note, *Ungagging the Press: Expedited Relief from Prior Restraints on News Coverage of Criminal Proceedings*, 65 GEO. L. J. 81, 113-14 (1976).

<sup>97</sup> Roney, *The Bar Answers the Challenge*, 62 A.B.A.J. 60, 63 (1976).

entered the orders or they had received the appellate documents.<sup>98</sup> Other appellate courts, however, have taken weeks.<sup>99</sup> The conclusion must be a mixed one: appellate courts can act almost instantaneously, but some lack the will to do so. When an appellate court demurs, a trial judge can enter an erroneous order, even one which frustrates the clear rules allowing the media to report on proceedings held in open court,<sup>100</sup> and do the harm before an appellate court can reverse.

On the other hand, instantaneous appellate action cuts against the American grain; it gives the appearance of a "shoot now, look later" decision. The judicial process, especially at the appellate level, prides itself on articulated reasoned results. The tradition includes full briefing, informed judges, a collegial decision, a circulated opinion, and announced reasons.<sup>101</sup> British appeals contrast sharply. Immediately after oral argument, British judges announce their decision from the bench. If policies interfere with our goal of swift decisions, perhaps American courts can adopt some of the British experience for use in restrictive order appeals.

These observations are inherent in the functions of appellate courts: 1) to announce, clarify, and harmonize the rules of decision; and 2) to review particular trial court decisions for correctness. The first function provides published opinions to guide attorneys and trial judges in the future; the second rein-

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<sup>98</sup> See *WXYZ v. Hand*, 3 Med. L. Rptr. 1430, 1431 (E.D. Mich. 1977) (temporary restraining order granted the day complaint filed); *State v. Bannister*, 3 Med. L. Rptr. 1997, 1998 (Fla. Dist. Ct. App. 1978) (2-3 days from petition to decision); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 497 (Iowa 1976) (next day); *Times-Picayune Pub'g Corp. v. Marullo*, 334 So. 2d 426, 426 (La. 1976) (same day); *Keene Pub'g Corp. v. Keene District Court*, 380 A.2d 261, 262 (N.H. 1977) (next day); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 144 (Ohio 1976) (Celebrezze, J., dissenting) (8 days). See also Note, *supra* note 96, at 118 (5 days).

<sup>99</sup> See *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241, 242 (1978) (per curiam) (Rehnquist, J., dissenting) (two weeks to Pennsylvania Supreme Court); *Oklahoma Pub'g Co. v. District Court*, 429 U.S. 967, 967 (1976) (5 weeks to the United States Supreme Court); *Gannett Pacific Co. v. Richardson*, 580 P.2d 49, 52 (Hawaii 1979) (2 weeks to Supreme Court of Hawaii); *Williams v. Stafford*, 589 P.2d 322, 324 (Wyo. 1979) (22.5 weeks to Supreme Court of Wyoming); *Oklahoma Pub'g Co. v. District Court*, 555 P.2d 1286, 1284 (Okla.), *rev'd per curiam*, 439 U.S. 308 (1977) (10 weeks to Oklahoma Supreme Court); *State ex rel. Beacon Journal Pub'g Co. v. Kainrad*, 348 N.E.2d 695, 695 (Ohio 1976) (17 weeks to Ohio Supreme Court); *New York Times Co. v. Starkey*, 380 N.Y.S.2d 239, 241 (N.Y. 1976) (2 weeks).

<sup>100</sup> Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 556-57 (1977).

<sup>101</sup> P. CARRINGTON, D. MEADOR, M. ROSENBERG, *supra* note 71, at 31.

forces trial courts' authority or obviates the effect of error. Courts generally combine these functions without excessive tension. In restrictive order cases, however, the appellate court may find that it cannot articulate a reasoned opinion promptly enough to avoid the effect of a trial court's error. When reviewing a restrictive order, if the appellate court acts fast enough to avoid perpetuating error, then deciding particular lawsuits may dominate over considerations of creating precedent.

Perhaps it is not necessary to choose between prompt review and reasoned opinion. When trial courts need future guidance, much may be said for the way the Iowa Supreme Court disposed of *Des Moines Register & Tribune Co. v. Osmundson*.<sup>102</sup> The trial judge restrained dissemination of information about jurors, but the next day the Iowa Supreme Court prevented the trial judge from enforcing that order. It reserved jurisdiction to write an opinion following submission of briefs. Several months later, the supreme court issued a full dress opinion.<sup>103</sup> While the approach was one of "shoot now, look later," this was preferable to one of "shoot now, never look." The risk of such a procedure is that a later opinion will not conform with a previously announced decision. It has been noted that "conclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision."<sup>104</sup> Because restrictive orders place an extraordinary strain on procedure, we commit this risk to the professionalism of appellate judges and to the possible usefulness of short, unsigned per curiam opinions.

A less attractive alternative to reviewing restrictive orders also exists. The flexibility of the mootness doctrine lets an appellate court indulge in the reverse of the foregoing—it can write opinions without deciding lawsuits. Part of the doctrine's flexibility grows out of the tension between appellate courts' deciding and announcing functions. If an appellate court exists to ensure correct decisions in individual lawsuits, then, at the earliest possible moment, that court should stay and decide any restrictive order which ostensibly infringes the media's

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<sup>102</sup> 248 N.W.2d 493 (Iowa 1976).

<sup>103</sup> See also, *Ray v. Blair*, 343 U.S. 214, 216 (1952); *Ray v. Blair*, 343 U.S. 154 (1952) (per curiam); *United States v. Sherman*, 581 F.2d 1358, 1359 (9th Cir. 1978).

<sup>104</sup> P. CARRINGTON, D. MEADOR, M. ROSENBERG, *supra* note 71, at 31.

rights. Under this approach, the only restrictive order appeals which become moot are those the parties fail to bring to the court in time to correct.<sup>105</sup> On the other hand, if a court's principal role is to develop, articulate, and announce a body of precedent, then the timing of review is not critical. The court, to guide lower courts and attorneys, may publish opinions which do not affect actual controversies.<sup>106</sup> Mootness decisions mirror this conflict: "the cases applying [the general mootness rules] are not entirely consistent with each other."<sup>107</sup>

Proceeding with the criminal trial generally moots appellate review of restrictive orders before the parties complete the usual appellate schedule.<sup>108</sup> In order to satisfy the function of establishing reasoned precedent, the rules of mootness have been modified arguably to include restrictive orders: society requires a precedent to guide the resolution of individual issues which avoid review, yet are likely to recur.<sup>109</sup> Many appellate courts accordingly follow *Nebraska Press* and hold that restrictive order appeals are not "moot" if the problem is likely to occur again.<sup>110</sup>

While few quarrel with the goal of developing the body of precedent, it is possible to criticize appellate courts which file restrictive order opinions after the events which gave rise to the appeal have passed. Declining to decide the concrete issue with a stay or extraordinary writ while the issues are still alive only to turn in a ringing opinion later<sup>111</sup> may, in particular, be ques-

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<sup>105</sup> See, e.g., *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam).

<sup>106</sup> See Note, *supra* note 96, at 101-02.

<sup>107</sup> J. NOWAK, R. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 60 (1978). Cf. *Williams v. Stafford*, 589 P.2d 322, 323 (Wyo. 1979) (court denied relief to petitioners, but established standards for future similar cases).

<sup>108</sup> *State v. Bannister*, 3 Med. L. Rptr. 1997, 1998 (Fla. Dist. Ct. App. 1978).

<sup>109</sup> See *Southern Pacific Terminal Company v. ICC*, 219 U.S. 498, 515 (1911).

<sup>110</sup> *United States v. Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977); *United States v. Schiavo*, 504 F.2d 1, 5 (3d Cir.), cert. denied, 419 U.S. 1096 (1974); *Commercial Printing Co. v. Lee*, 553 S.W.2d 270, 271-72 (Ark. 1977); *State ex rel. Miami Herald Pub'g Co. v. McIntosh*, 340 So. 2d 904, 911 (Fla. 1976); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 256-57 (Minn. 1977); *State v. Allen*, 373 A.2d 377, 380 (N.J. 1977); *Gannett Co. v. De Pasquale*, 372 N.E.2d 544, 547 (N.Y. App. 1977), affirmed, 99 S. Ct. (1979); *State ex rel. Beacon Journal Pub'g Co. v. Kainrad*, 348 N.E.2d 695, 696 (Ohio 1976). But see *Schuster v. Bowen*, 496 F.2d 881, 881 (9th Cir. 1974).

<sup>111</sup> See e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1027 (1975).

tioned. Vindicating the abstract principle after refusing to decide the concrete controversy extends a hollow victory to the winner, supplies scant incentive to correct later erroneous orders, and confirms the gibe that courts display one set of first amendment values and apply another. Vigorous opinions after restrictive orders expire offer only specious and abstract safeguards to people who groaned under illegal orders while waiting for a belated decision.<sup>112</sup> Giving the media "the choice of obeying an order and awaiting appellate action while their alleged civil rights continue to be infringed, or of disobeying the order and then facing certain contempt convictions, makes any subsequent victory on appeal Pyrrhic indeed."<sup>113</sup> The practice of reviewing restrictive orders after they expire provides an argument against the collateral bar rule, just as the collateral bar rule provides an argument for a prompt appellate decision.<sup>114</sup> Courts should act promptly to obviate trial court error and review restrictive orders rapidly to shorten the sway of unconstitutional but unchallengeable orders.<sup>115</sup>

### III. CHALLENGING THE VALIDITY OF RESTRICTIVE ORDERS

#### A. *The Collateral Bar Rule*

It is entirely possible that a court will enforce a restrictive order without considering its validity. The *Dickinson* court approved the use of contempt despite the finding that the order was unconstitutional. The doctrine which allows a judge to impose criminal contempt sanctions on a defendant who has violated a substantively invalid injunction is known as the collateral bar rule. It holds that the contempt proceeding is collateral to the breached order and rejects as a defense to contempt the argument that the order is wrong. Contemnors may defend criminal contempt only by arguing that the order is void because the court lacked personal or subject matter jurisdic-

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<sup>112</sup> See e.g., *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (Supreme Court's 1968 decision reversing an order that expired in August of 1966).

<sup>113</sup> *United States v. Schiavo*, 504 F.2d 1, 11 (3d Cir.), cert. denied, 419 U.S. 1096 (1974).

<sup>114</sup> *Id.* at 11 (Adams, C.J., concurring).

<sup>115</sup> See, e.g., *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

tion.<sup>116</sup> Sound policy supports the collateral bar rule: people must settle disputes in an orderly fashion and show respect for the court system.

Critics attack use of the collateral bar rule in restrictive order contempts. First, the procedure that trial judges follow in deciding whether to adopt an order and how to formulate it is often hasty; judges have issued restrictive orders without considering fully the media's interests.<sup>117</sup> "[T]he order is arguably non-injunctive and issued by a criminal rather than a civil court, without the usual protections of adversary adjudication, purporting to bind, upon mere knowledge, persons not parties to the underlying action."<sup>118</sup> The media is often forced into the position of violating the order because it cannot mount and complete effective review in time to meet reporting deadlines.<sup>119</sup> Violation is its only alternative. "The collateral bar rule places the entire burden of the judicial time delay problem on the party whose perishable rights are at stake."<sup>120</sup> Furthermore, the "rights at stake" are constitutional rights. "The interest of the public and litigants will not allow an individual to be deprived of such rights simply because a court, at an earlier time, made an incorrect ruling."<sup>121</sup> Imposing contempt for violating an unconstitutional order punishes a citizen for doing something which the basic law approves. Even if the order is correct, contempt under the collateral bar rule decides without examining the merits of the order, thereby creating the appearance that the judge has converted respect into revenge. Merit avoidance techniques are not favored devices in an open and democratic society.

*Nebraska Press* strengthens the conclusion that many re-

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<sup>116</sup> *United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir.), *on remand*, 349 F. Supp. 227 (M.D. La. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

<sup>117</sup> Landau, *supra* note 84, at 58; Rendleman, *supra* note 4, at 150-53.

<sup>118</sup> Rendleman, *supra* note 4, at 152.

<sup>119</sup> See Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 505 (1977); Note, *supra* note 96, at 90, 121.

<sup>120</sup> Note, *Gag Orders on the Press: A Due Process Defense to Contempt Citations*, 4 HASTINGS CONST. L. Q. 187, 203 (1977).

<sup>121</sup> Vestal, *Law of the Case: Single Suit Preclusion*, 1967 UTAH L. REV. 1, 29. But see *United States v. Dickinson*, 476 F.2d 373, 374 (5th Cir.) (*per curiam*), *cert. denied*, 414 U.S. 979 (1973).



strictive orders are wildly unconstitutional. Accordingly, an exception to the collateral bar rule has developed. In *Walker v. Birmingham*, the Supreme Court approved Alabama's collateral bar rule but hinted that the rule would not apply when the violated order is "transparently invalid."<sup>122</sup> Some writers argue that restrictive orders against disseminating material from open court proceedings are "transparently invalid" and within the *Walker* exception.<sup>123</sup> Under these critiques, the media could disseminate in the face of a severely deficient restrictive order and take its chance in contempt. If the order was wrong, no contempt would result; if the order was correct or only marginally wrong, the court could impose contempt.<sup>124</sup> For example, *Nebraska Press* and the *Walker* exception would allow Mary Quill to publish despite Judge Pinball's order.

Judicial techniques to avoid wielding the collateral bar rule are available. As the final curtain rang down on the contempt litigation concerning Ross Barnett's attempts to prevent James Meredith from desegregating Ole' Miss, Judge Wisdom observed wryly but perceptively: "There is no doubt that a contempt proceeding has play in the joints."<sup>125</sup> More specifically, judges feel free at any point in a contempt proceeding to exercise discretion on behalf of people charged with contempt. Courts have used this discretion to ameliorate the rigorous application of the collateral bar rule, often without much concern for doctrinal consistency.

Such leniency is often presented in restrictive order contempt cases.<sup>126</sup> On occasion the courts have struck down unconstitutional orders without mentioning the possibility of a contempt proceeding.<sup>127</sup> An Illinois court ignored apparently binding precedent, stated that it was "not persuaded" by

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<sup>122</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967).

<sup>123</sup> See, e.g., *Barnett*, *supra* note 100, at 555-58; *Goodale*, *supra* note 119, at 509. See also *Rendleman*, *supra* note 4, at 161-62.

<sup>124</sup> *Goodale*, *supra* note 119, at 509; *Rendleman*, *supra* note 4, at 159-61; Note, *supra* note 96, at 111; Note, *supra* note 120 at 217-18.

<sup>125</sup> *United States v. Barnett*, 346 F.2d 99, 107 (5th Cir. 1965) (Wisdom, C.J., dissenting).

<sup>126</sup> *Rendleman*, *supra* note 4, at 153-54 (collection of earlier cases).

<sup>127</sup> See, e.g., *Oklahoma Pub'g Co. v. District Court*, 430 U.S. 308 (1977); *United States v. Schiavo*, 504 F.2d 1 (3d Cir.) *cert. denied*, 419 U.S. 1096 (1974) *Times-Picayune Pub'g Corp. v. Marullo*, 334 So. 2d 426 (La. 1976); *New York Times Co. v. Starkey*, 380 N.Y.S.2d 239 (N.Y. 1976).

*Dickinson*, and held that illegal restraints on communication are outside the collateral bar rule.<sup>128</sup> The Senate Staff Report on free press and fair trial advocates avoiding the collateral bar rule by staying any contempt hearing or punishment until review of the underlying order is completed.<sup>129</sup>

Aside from *Dickinson*, reported decisions favor the lenient approach. Research reveals no other reported decision imposing contempt on a media representative for disseminating material about the judicial process despite an unconstitutional restrictive order.<sup>130</sup> This result is sound. Courts should refuse to place anyone in the dilemma of choosing between silence in the face of an unconstitutional order or punishment for exercising a constitutional right. In restrictive order contempts, the collateral bar rule undermines the first amendment.<sup>131</sup> Open and vigorous debate on public issues cannot flourish when judges punish people who disseminate constitutionally protected expression.

While the foregoing militates against the collateral bar rule in restrictive order contempts, recent procedural developments may be adduced as reasons that courts might use it. Lack of notice, party status, a hearing, and an appeal are the best arguments against applying the rule to contemnors charged with breaching restrictive orders. As noted earlier, however, courts are developing procedural structures to issue and review restrictive orders.<sup>132</sup> Notice that an order may be granted permits the media an opportunity to show that a restrictive order is unnecessary, forces the judge to consider alternatives, and allows the media to assist in shaping any order

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<sup>128</sup> *Cooper v. Rockford Newspapers, Inc.*, 365 N.E.2d 746, 751 (Ill. App. Ct. 1977). The binding precedent is *UMW of America Hospital v. UMW Dist. 50*, 288 N.E.2d 455, 457 (Ill. 1972).

<sup>129</sup> STAFF REPORT, *supra* note 51, at 12.

<sup>130</sup> Note, *supra* note 120 at 195-96.

<sup>131</sup> BACKGROUND REPORT, *supra* note 43, at 78.

<sup>132</sup> Some argue that promulgating restrictive order procedure will encourage judges to issue orders they otherwise would refuse to consider, Note, *supra* note 96, at 85; that such a result will delay and detain the criminal trial, Roney, *supra* note 97, at 61-62; and that it will baptize substantially incorrect orders, see THE REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, PRESS CENSORSHIP NEWSLETTER No. X at 35 (Sept.-Oct. 1976). These assumptions are incorrect for two reasons. First, they assume that the procedure will not work. Second, they assume that almost all restrictive orders are substantively invalid. While this may be true of trial orders, it is not true of sealing and closing orders.

before the court grants it. Prompt appellate review provides an opportunity to correct erroneous restrictive orders. The more procedure available, the more a restrictive order looks like an injunction, and the more legitimate it becomes to apply the collateral bar rule.<sup>133</sup>

The argument for applying the collateral bar rule to violations of restrictive orders preceded by notice and an opportunity to be heard is strong. The media should respect the court and test the order in a legal fashion. In particular, the media should not appoint itself judge in its own case and flout the order, potentially endangering the trial process, impairing the defendant's rights, and creating public disrespect for the court system. Good citizens obey judicial orders until they are dissolved, modified, or reversed on appeal. Therefore, as part of the procedure which leads to justifiable use of the collateral bar rule, access to review is essential.

In *National Socialist Party v. Village of Skokie*, the Supreme Court held that a procedure to enjoin a parade or demonstration must include either immediate appellate review or a stay.<sup>134</sup> That conclusion is more clearly compelled in dealing with restrictive orders. Because of the odd party structure in restrictive orders, the sensitive rights at issue, and the propensity of trial judges to ignore the media's interests, this author concludes that, after *Skokie*, even if notice and an opportunity to be heard precede a restrictive order, the media is entitled to a review of the order on the merits before a court may impose the collateral bar rule in contempt.<sup>135</sup>

Despite cogent criticism of the present author's position that judges should not issue injunctions absent advance notice and an opportunity to be heard,<sup>136</sup> this writer continues to believe that unless the media receives notice and an opportunity to be heard, it should be able to ignore a restrictive order with impunity.<sup>137</sup> If notice and a hearing precede a restrictive order,

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<sup>133</sup> Rendleman, *Toward Due Process in Injunction Procedure*, 1973 ILL. L. F. 221, 248; Rendleman, *More on Void Orders*, 47 GA. L. REV. 246, 282-85 (1973).

<sup>134</sup> 432 U.S. at 44.

<sup>135</sup> Note, *supra* note 96, at 116.

<sup>136</sup> Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 582-89 (1975); Rendleman, *More on Void Orders*, *supra* note 133, at 291-309; Rendleman, *Toward Due Process in Injunction Procedure*, *supra* note 133, at 241-53.

<sup>137</sup> Rendleman, *supra* note 4, at 151-52. But see Note, *supra* note 120, at 216 n.137.

should the collateral bar rule insulate the order from scrutiny in the contempt trial of a violator? Yes, if the contemnor had reasonable access to review and time to seek it. In *Walker*, the Court affirmed contempt without considering whether the order was constitutional; one reason, the Court stated, was that the contemnors could have sought review but failed to do so. If, the Court hinted, the defendants had moved to dissolve the injunction or attempted to appeal it but had "met with delay or frustration," then they could have violated the order and its validity would have been an appropriate issue in contempt.<sup>138</sup>

At this juncture, it is beneficial to apply the above suggestions to the hypothetical involving Mary Quill. Assume Judge Pinball mails notice to the *Trumpet* and holds a hearing two weeks before the trial. After hearing evidence and argument, the judge forbids the paper to publish jurors' names. The *Trumpet* does nothing during the fortnight even though the nearby state appellate court vacated an earlier restrictive order the day after the judge granted it. After the jury is sworn, the *Trumpet* publishes the jurors' names and pictures. If the issues are ventilated in an early adversary hearing, the judge may impose the collateral bar rule. Judge Pinball could properly charge contempt and interpose the collateral bar rule to prevent the *Trumpet* from arguing that the order was wrong.<sup>139</sup>

If Judge Pinball issues the order the day before trial, a more pragmatic inquiry must be followed. First, contempt's "play in the joints" might instruct a court to be lenient and reject the collateral bar rule. If the court concludes that the order is invalid, it should consider, despite the collateral bar rule, "whether the judgment of contempt or the punishment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm."<sup>140</sup> Second, whether either the parties or the trial judge delayed the restrictive order hearing until the last moment should bear on

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<sup>138</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 318 (1967). See also *United States v. Ryan*, 402 U.S. 530, 532 n.4 (1971).

<sup>139</sup> Rendleman, *Toward Due Process in Injunction Procedure*, *supra* note 133, at 248.

<sup>140</sup> *United States v. Dickinson*, 465 F.2d 496, 514 (5th Cir.), *remand*, 349 F. Supp. 227 (M.D. La. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973). Neither the district court on remand, the second appellate panel, nor the Supreme Court took this salutary hint.

the decision to suspend or apply the collateral bar rule. Delay until just before the restricted event, followed by unseemly haste to enter an order, militates against its application.

Moreover, if the event follows hard upon the heels of the restrictive order hearing, the judge should delay the event to allow the affected media to seek an extraordinary writ or a stay.<sup>141</sup> If the media fails to seek appellate relief before breaching, it has passed up an opportunity to challenge the order in a timely fashion; the judge then may intercalate the collateral bar in good conscience. If the media seeks review, but meets "delay or frustration," the media should violate the order and take its chances that the order is wrong.

What is delay or frustration? The media should extend the appellate court a meaningful opportunity to consider and evaluate the merits. It should not simply file appellate papers and then disobey the order if no relief is forthcoming by "press time."<sup>142</sup> Many appellate courts review restrictive orders within hours, if not days. But generalization is perilous. Newspapers in cities like New Orleans and New York with both trial and appellate courts nearby may expect same-day service. Jonesville, in the southwest corner of Virginia where the trial courts of Lee County sit, is closer to eight state capitols, including Columbus, Ohio, than it is to Richmond. American appellate judges are probably not ready for telephoned oral arguments.<sup>143</sup> Finally, if an appellate court refuses to stay a restrictive order before the event without giving an opinion on the merits of the order, then on a contempt appeal after violation that court should consider whether the collateral bar rule serves any useful purpose.<sup>144</sup> These generalizations are not easy to apply, but they focus judgment on the critical issues in deciding whether to apply the collateral bar rule to restrictive order contempts.

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<sup>141</sup> Note, *supra* note 96, at 114.

<sup>142</sup> *Contra*, Goodale, *supra* note 119, at 511.

<sup>143</sup> *But cf. Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, F. R. Civ. P. 30(b), (Feb. 1979) (permits telephone depositions).

<sup>144</sup> See *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*).

## B. *Substantive Doctrine*

Appellate review cannot always offset the harm produced by erroneous restrictive orders. Impecunious businesses may accede to orders to save the expense of an appeal. The delay inherent in the appellate process will impede some dissemination even for the affluent. Even workable review cannot substitute for clear substantive standards which trial courts can apply easily and correctly. The necessity for clear standards is especially important when one realizes that restrictive orders are ancillary to criminal prosecutions and are often entered without extended consideration. Trial judges ought to be able to discern quickly and easily, without extensive deliberation and research, what will do and what will not.

The guidance given in reviewing restrictive orders is founded in prior restraint analysis. The use of prior restraint doctrine in analyzing restrictive orders presents several basic difficulties. First, courts use the words "prior restraint" to deal with two discrete problems: procedural restraints and substantive-remedial restraints. Procedural restraints are rules to govern the process the government may use to sort out protected expression from the unprotected; for example, the merely sexually explicit from obscenity. Because the government legitimately regulates conduct on the borderland of expression, courts require careful processes or procedural restraints.<sup>145</sup> This article has considered the procedural restraint problem in its discussion of restrictive orders and notice, a hearing, and findings.

Without articulating the basic distinction, courts also use the words "prior restraint" to characterize the question of whether a particular rule of conduct unconstitutionally proscribes protected expression. However, the two separate spheres of prior restraint merit different analytical tools.<sup>146</sup> Using the same standards for both substantive and procedural analysis diffuses thought. Restrictive order procedure is informal, juryless, and may include a collateral bar; but character-

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<sup>145</sup> L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 12-31 (1978); Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509, 533-35 (1977); Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 688 (1978).

<sup>146</sup> Rendleman, *supra* note 145, at 534.

izing restrictive orders as prior restraints adds nothing but confusion to the different questions of whether the procedure is constitutional and whether the order interdicts protected expression.

A second problem presented in using prior restraint analysis is the disparate treatment afforded "prior restraints" and identical criminal or civil sanctions. Courts discussing prior restraints generally state or assume that a prior restraint is noncriminal in nature and that it differs from criminal punishment subsequent to the proscribed activity.<sup>147</sup> Courts say that restrictive order prior restraints operate with rigor: "a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."<sup>148</sup> But a restrictive order does not necessarily freeze speech; it stops speech like a stop sign stops an automobile driver. The order, like a statute, establishes the standard; the conduct follows; and if the court decides that the conduct violates the standard, the state punishes the actor. If someone commences contempt proceedings charging violation of a restrictive order, then contempt is analogous to a criminal prosecution or to a civil action. Punishment for contempt is no more or less subsequent than punishment for breaching a criminal statute. The sanction imposed after finding contempt resembles both criminal punishment and civil money judgments.<sup>149</sup>

Courts compound the confusion by disapproving a prior restraint while saying that they would approve an identical criminal or civil rule.<sup>150</sup> If the conduct proscribed by a prior restraint is unpunishable as either a crime or a tort, the court should be able to invalidate the restraint under substantive doctrine applicable to all three remedial systems. An example is provided by *Nebraska Press*. The Supreme Court used prior

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<sup>147</sup> See, e.g., *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 498 (Iowa 1976).

<sup>148</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>149</sup> See, e.g., *In re Herndon*, 325 F. Supp. 779 (M.D. Ala. 1971) (per curiam) (civil contempt in same case); *Hadnott v. Amos*, 325 F. Supp. 777 (M.D. Ala. 1971) (per curiam) (civil contempt); *United States v. Brotherhood of R.R. Trainmen*, 95 F. Supp. 1019 (D.D.C. 1951). O. FISS, *THE CIVIL RIGHTS INJUNCTION* 69-70 (1978); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 550-51 (1977).

<sup>150</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Near v. Minnesota*, 283 U.S. 697, 711, 715 (1931).

restraint doctrine against an order invalid as either a tort standard or a criminal statute. Since the first amendment forbids government sanctions against people who disseminate information revealed in open court, the Supreme Court unnecessarily applied prior restraint analysis.<sup>151</sup> Prior restraint doctrine merely provides a subterfuge to decide in favor of particular speech without adjudicating whether parallel criminal or civil law is valid.

The third major flaw in using prior restraint analysis in restrictive order cases is the substantial obscurity created about what kind of things are invalid. For example, *Near v. Minnesota*<sup>152</sup> decided that, in addition to executive licensing, injunctions could be prior restraints. However, *Near* is ambiguous because it fails to clarify whether the Minnesota statute was unconstitutional because it permitted an injunction forbidding any publication by the newspaper or because it allowed an injunction which let the newspaper publish again but created potential judicial censorship.<sup>153</sup>

More recent decisions add to the obscurity. Of particular importance is *Nebraska Press*. Justice Brennan, in *Nebraska Press*, favors clear rules against restrictive orders; he would achieve this by holding that the only acceptable prior restraints are those which forbid dissemination of national security information in time of war.<sup>154</sup> Chief Justice Burger's opinion, on the other hand, allows some restrictive orders,<sup>155</sup> but applies "the nadir of first amendment protection" to judge "the legality of prior restraints."<sup>156</sup>

After holding that an order forbidding the media from disseminating material is an invalid prior restraint, the majority opinion says in dicta that a similar order against trial participants is a measure short of a prior restraint.<sup>157</sup> This idea points

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<sup>151</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 568 (1976); *id.* at 596 (Brennan, J., concurring); Barnett, *supra* note 100, at 545-46, 550; Sack, *Principle and Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 411, 414-15 (1977).

<sup>152</sup> 283 U.S. 697 (1931).

<sup>153</sup> See *id.* at 705-06, 709-13; *id.* at 736 (Butler, J., dissenting).

<sup>154</sup> 427 U.S. at 588, 592-93 (Brennan, J., concurring).

<sup>155</sup> *Id.* at 570.

<sup>156</sup> Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 431 (1977).

<sup>157</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976) (dicta).



out a key problem in using prior restraint analysis. A restrictive order by any other name silences as effectively; and the defendant's attorney may feel just as restrained as the media.<sup>158</sup> Prior restraint doctrine allows courts to manipulate results by affixing labels.

Similarly, one court said that denying access to material is not a prior restraint but an order short of prior restraint.<sup>159</sup> Other courts have held that orders closing a courtroom or sealing a transcript are not prior restraints.<sup>160</sup> Nonetheless, these orders, if effective, curtail expression; a sealing or closing order is "the functional equivalent of a prior restraint on speech or publication."<sup>161</sup>

The resulting doctrine is that the government can keep secrets by locking the barn door, but once the horse escapes from the barn the newspaper may publish stories about it.<sup>162</sup> Apparently the right to disseminate material is broader than the right to have it disclosed; and a newspaper may publish things about which it had no right to learn. Such a result places prior restraint analysis in a vacuum; instead of factually and systematically analyzing the entire problem of publicity in the judicial process with uniform standards, courts subscribing to prior restraint will deal with trial participants and closing and sealing orders under one theory and with trial silence orders under prior restraint. If the government can seal and close, denying access to everybody equally, prior restraint doctrine

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<sup>158</sup> Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607 (1977); BACKGROUND REPORT, *supra* note 43, at 18-24, 46, 68-71.

<sup>159</sup> United States v. Gurney, 558 F.2d 1202, 1211 (5th Cir. 1977).

<sup>160</sup> Miami Herald Pub'g Co. v. State, 363 So. 2d 603, 607 (Fla. App. 1978). See also, Williams v. Stafford, 589 P.2d 322, 324 (Wyo. 1979). [Ed. note: In *Gannett*, the majority distinguishes the direct prior restraint of *Nebraska Press* from the present "exclusion" order. 99 S. Ct. \_\_\_, \_\_\_ n.25 (1979).]

<sup>161</sup> Note, *The Free Press-Fair Trial Dilemma: New Dimensions in a Continuing Struggle*, 6 HOFSTRA L. REV. 1013, 1031 (1978).

<sup>162</sup> See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *id.*, at 849 (Stewart, J., concurring); *Oklahoma Pub'g Co. v. District Court*, 430 U.S. 308, 310-12 (1977) (per curiam); *Cox Pub'g Corp. v. Cohn*, 420 U.S. 469, 496 (1975); *United States v. Gurney*, 558 F.2d 1202, 1211 n.15 (5th Cir.); *Gannett Co. v. De Pasquale*, 372 N.E.2d 544, 549-50 (N.Y. 1977), *affirmed* 99 S. Ct. \_\_\_ (1979). Cf. *In re Halkin*, 4 Med. L. Rptr. 2025, 2032-35 (D.C. Cir. 1979) (relationship between access under compulsory process and the right to disseminate). See also, Annot., 39 A.L.R. Fed. 871 (1978); Standard 8-3.1, ABA STANDARDS, *supra* note 7, at 13-14.

may not help much except for "public" trials. Thus, obscure prior restraint doctrine detracts from the simple idea that in a democracy, the public is entitled to observe how the system of justice is treating people unless compelling reasons for secrecy exist.<sup>163</sup>

*Nebraska Press* may even be ineffective in suppressing orders not to disseminate materials from an open trial. The Supreme Court states the effect of a prior restraint opaquely: we assume that the nature of the restriction compels additional safeguards but allows prior restraints when the government leaps the hurdle of justification.<sup>164</sup> While striking down the order in *Nebraska Press*, the majority opinion explicitly assumed that it might approve a similar, more justified, order another day.<sup>165</sup> Restrictive orders barring dissemination of information from an open judicial proceeding may occur again.<sup>166</sup>

Prior restraint doctrine hampers intelligent analysis of restrictive order issues. The courts have said something like, "We

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<sup>163</sup> "A popular Government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives." WRITINGS OF JAMES MADISON 103 (G. Hurst ed. 1910).

<sup>164</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569-70 (1976).

<sup>165</sup> *Id.* The majority opinion, however, lacks solidarity. Two of the five Justices who concurred in the opinion state different and somewhat less restrictive views. *Id.* at 570-71 (White, J., concurring); *id.* at 571-52 (Powell, J., concurring). Indeed, the Chief Justice's opinion may not even speak for a majority of the Court. See O. FISS, *THE CIVIL RIGHTS INJUNCTION* 103 n.2 (1978); *BACKGROUND REPORT*, *supra* note 43, at 84.

The Bar Association's standards appear to reflect this ambiguity. The 1976 procedural standards expressed no opinion on substantive law. Roney, *supra* note 97, at 71.

Justice Brennan's opinion, which expressed the views of three of the Justices, would have held that the government could not prohibit dissemination of "any information pertaining to pending judicial proceedings or the operation of the criminal justice system no matter how shabby the means by which the information is obtained." 427 U.S. at 588 (Brennan, J., concurring). Unlike Justice Brennan, Justice Stevens was unwilling to allow a reporter who steals information to escape contempt; however, he did accept the balance of Justice Brennan's views. *Id.* at 617 (Stevens, J., concurring). The Bar Association's 1978 Standards 8-4.2, which exonerates reporters from contempt unless they are guilty of "bribery, theft, or fraud" in acquiring the information, appears to adopt Justice Stevens' views instead of the putative majority's.

<sup>166</sup> Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485, 491 (1977); Linde, *Advice to the Press*, THE CENTER MAGAZINE, Jan.-Feb., 1979 at 2; Note, *supra* note 120, at 191; Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L.J. 342, 344-45 n.13 (1977); Note, *supra* note 96, at 86-87.

can't tell you what a prior restraint is but we know we don't like them." Courts should cease speaking of prior restraint in restrictive order opinions and instead ask whether the procedure followed was protective enough to ensure fair and intelligent decision and whether the order prohibits protected expression or conduct.

### CONCLUSION

The view that litigation is of interest only to the parties involved has lost ground in this age of government in the sunshine.<sup>167</sup> Indeed, as Frank Allen said, "the central problem of criminal law is and will remain political in character. It is the problem of achieving the objectives of public order through the use of power so regulated as to preserve and nourish the basic political values."<sup>168</sup> The press plays a significant role in the establishment of the criminal process as a part of the political sphere.

This system, with all its procedural protections and legal rules, is put under great stress by the use of restrictive orders. Inflexible dogma occasionally intrudes in restrictive order analysis to prevent prompt decisions on the merits. The result dims the appearance of justice. More often, inapplicable lore clouds the reasoning process.

Still, several developments have brought troubled areas into sharper focus. The courts, with the organized bar's help, have developed personal jurisdiction analysis and pre-order procedure; restrictive orders are now formulated in an adversary crucible. Appellate courts have adopted extraordinary writ appeals to restrictive orders. However, these developments do not leave us without problems. Appellate courts should review restrictive orders promptly instead of writing an opinion after the controversy has become moot. Finally, applying prior restraint doctrine to review restrictive orders is one of the law's

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<sup>167</sup> See Chayes, *The Role of the Judge in Public Interest Litigation*, 89 HARV. L. REV. 1281, 1283 (1976). See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). [Ed. note: *But see Gannett Co. v. De Pasquale*: the majority opinion and Justice Rhenquist's concurring opinion rely on the parties to enforce the right to a public trial. The dissent disagrees, citing the victim's and the public's interest in preventing improper court procedure].

<sup>168</sup> F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* viii (1964).

disaster areas. Courts cannot forge rational and socially responsive restrictive order doctrine so long as they redact the faded pieties and failed metaphors of prior restraint.

